Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

(continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION.

Appellees.

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I. INTRODUCTION

This brief is in opposition to the several Motions to Dismiss or Affirm filed by respondent Indian tribes,[1] and is submitted pursuant to Rule 16(4) of the Supreme Court Rules.

On the merits, the Tribes' major contention for affirmance is that the analysis and holding of the lower court is correct and therefore the appeal presents no substantial federal question not previously decided by this Court. Motion to Dismiss or Affirm of Confederated Tribes of the Colville Indian Reservation, et al.[2] pp. 9-18; Motion to Affirm of Confederated Bands and Tribes of the Yakima Indian Nation,[3] pp. 11-15.

The Tribes are in error. The analysis and holding of the lower court, with all due respect, are incorrect in that they misapply the "interference with self-government" test established in *Williams v. Lee*, 385 U.S. 217 (1959) and effectively ignore the reasoning and holding of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Furthermore, even if the lower court's analysis and holding are ultimately determined to be correct, the questions pertaining to, among other things, (1) tribal

[1]The United States, co-appellee in Civil No. 3909 below, apparently has not yet filed a Motion to Dismiss or Affirm. Because no extension of time has been granted the United States subsequent to January 8, 1979, the State assumes the normal timing of distribution of the briefs on file with the Court will be followed and the Court will shortly consider this appeal without regard to the position of the United States. If the United States submits a Motion to Dismiss or Affirm, the State does, of course, reserve the right to submit a reply to this Motion.

[2]Hereafter "Colville Motion".

[3]Hereafter "Yakima Motion".

preemption of a state's taxing power over its non-Indian citizens, and (2) tribal taxing power over non-Indians, have never been decided by this Court and are substantial federal questions involving fundamental relationships among the states, Indian tribes and the federal government.

These questions clearly require full briefing and argument before this Court.

The purpose of this brief is to respond to the Tribes' procedural defenses raised in their motions. Additionally, we call to the Court's attention *The Ute Indian Tribe v. State Tax Commission of the State of Utah*, ... F.2d ..... (10th Cir., 1978) cert. denied ..... U.S..... (Docket No. 78-292, decided November 13, 1978), a decision directly contrary to the holding of the court below.

II. ARGUMENT IN ANSWER TO YAKIMA INDIAN NATION'S CONTENTIONS

The questions presented in the Jurisdictional Statement raise issues of unreasonable burdens on tribal government and the power of the tribe to impose its taxes on non-Indian citizens.

The Yakima Indian Nation argues[4] that issues pertaining to (1) whether the State's cigarette tax as applied to non-members of the tribe (principally non-Indians) purchasing cigarettes from tribally licensed retailers constitutes an unreasonable burden on tribal self-government, and (2) whether the tribe

[4]Yakima Motion, pp. 11-12.

possesses the power to tax non-Indians on the reservation, are not properly before the Court.

According to the tribe, these issues are not included in the statement of the questions presented in the Jurisdictional Statement, and hence are excluded from this Court's consideration by Rule 15(c) of the Rules of the United States Supreme Court.[5]

The tribe's argument is erroneous. Questions pertaining to unreasonable burden on tribal self-government and tribal taxing power over non-Indians are clearly subsidiary questions fairly comprised within Questions 1-5 as presented in the Jurisdictional Statement. Jur. St., 7-8.

The basic question presented is whether the state may require tribes or their retailers to collect state excise taxes imposed on non-Indian purchasers. This in turn is totally dependent upon whether the state may impose such taxes upon non-Indian purchasers in the first instance.

The touchstone of the three-judge district court's decision was that the state could not impose its excise taxes on non-Indian purchasers because (1) the tax constitutes an unreasonable interference with tribal

[5]Rule 15(c) provides:
"The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be repetitious. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."

self-government,[6] and (2) the state's tax has been preempted by a tribal tax.[7]

As shown by the district court's analysis, the question of unreasonable interference with tribal self-government is not only fairly comprised within the questions presented, but also it is absolutely essential to a resolution of those questions. As stated by the court:

> " * * * We hold that as applied to non-Indians as a result of their on-reservation purchases from Dealers, the State's cigarette taxing scheme constitutes an interference with tribal self-government."[8]

[8]App. Jur. St., p. 36.

Thus, this question is before the Court in accordance with Rule 15(c).

Similarly, the question pertaining to tribal taxation of non-Indians is before the Court. A fair reading of the district court's opinion demonstrates that the court's preemption analysis was grounded upon the assumption that both the tribes and the state were taxing the same non-Indian purchasers. For example, the district court found that the tribes were exercising governmental powers delegated under §16 of the Indian Reorganization Act, 25 U.S.C. §476. As stated by the court, "[t]he power to tax both Indians and non-Indians was one of those powers." App. Jur. St. p. 34. Even more clearly, the district court summarized its view of the case as follows:

"In this case, both the State and the Tribes *seek*

[6]App. Jur. St., pp. 37-40.
[7]App. Jur. St., pp. 32-36.

to tax non-Indians as a result of their on-reservation transactions with Dealers." (Emphasis supplied) App. Jur. St., p. 37.

The district court's assumption that the tribes were taxing non-Indians (and further, that the tribes *could* tax non-Indians) is clearly a necessary predicate to its conclusion that the tribal tax preempted the state tax. If the tribal tax reached only Indians and the state's tax reached only non-Indians, how could it logically be concluded that tribal taxation preempted state taxation? Simply stated, it would be illogical, and the district court so recognized.

In short, questions pertaining to an alleged unreasonable burden on tribal self-government and tribal taxing powers over non-Indians are fairly comprised within the questions presented in the Jurisdictional Statement. These questions are substantial federal questions of enormous consequences to the citizens of this nation—Indian and non-Indian alike. Therefore, we respectfully urge the Court to disregard the argument of the Yakima Indian Nation pertaining to compliance with Rule 15(c).

III. ARGUMENT IN ANSWER TO CONTENTIONS OF COLVILLE INDIAN TRIBE, ET AL.

The appeal of issues pertaining to the imposition of the State's vehicle excise taxes as applied to tribal members residing on the reservation and using such vehicles partly on and partly off the reservation has been timely filed.

The appellee Colville, Lummi, and Makah Tribes

have moved to dismiss that portion of the State's appeal pertaining to the motor vehicle, travel trailer and camper excise taxing scheme as well as that portion pertaining to the validity of the partial assumption of state civil and criminal jurisdiction over the Makah and Lummi Reservations on the grounds that the State did not file a timely notice of appeal as required by 28 U.S.C. §2101(b).

The procedural events involving the State's notices of appeal are fairly set out in the Colville Motion at pp. 8-9.

Essentially, the question is whether the state's timely Motion for a Partial New Trial, ostensibly addressed only to a portion of the District Court's judgment, nevertheless destroys the finality of all portions of the judgment for purposes of appeal.

If the answer to this question is "yes", the motor vehicle excise tax issues have been timely appealed because these issues were contained in the State's Amended Notice of Appeal in No. 3868 (Jur. St. App., 87-89) filed within 60 days of the filing of the lower court's Order Denying Motion for Partial New Trial. 28 U.S.C. §2101(b).

The general rule is that a judgment is not final, for purposes of computing the time for taking of an appeal, until a motion for a new trial, if entertained by the court, has been disposed of. *United States v. Ellicott*, 223 U.S. 524 (1912); *United States v. Seminole Nation*, 299 U.S. 417 (1937), and cases cited therein. This is because the original judgment ren-

dered is still under the control of the trial court and therefore cannot be deemed a final disposition of the cause until a new trial has been granted or refused. *Kingman & Co. v. Western Mfg. Co.*, 170 U.S. 675 (1898).

Here, the *entire* final judgment of the trial court was still under its control. True, the State indicated in its Motion that the new trial would be limited to the cigarette and sales taxing issues decided by the court. Jur. St. App., 25. But that is just another way of stating that the State's arguments would be directed to modifying that particular portion of the court's judgment dealing with these issues. The trial court still retained the power to amend, modify or vacate its judgment, *qua* judgment, for purposes of altering it as a result of arguments advanced at the new trial.

Additionally, where a partial new trial has been granted pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, those portions of the judgment not re-tried do not become a final judgment. Rather they are merged into and become a part of the judgment entered following retrial. *Weymouth v. Colorado Interstate Gas Co.*, D.C. N.D. Tex., 34 F.R.D. (1963), aff'd. 367 F.2d 84 (5th Cir. 1965).

It would be illogical in the extreme to hold that a portion of a judgment is final for purposes of appeal but not final for purposes of entry after retrial. At best, this would encourage, if not require, piece-

meal appeals of a single action, causing confusion, delay, and expense to the parties and the courts.

For the foregoing reasons, it is clear that the Court should not grant the Tribes' Motion to Dismiss those portions of the appeal pertaining to the motor vehicle excise tax issues. The finality of that portion of the lower court's judgment on these issues has been destroyed by the State's Motion for a Partial New Trial. For purposes of appeal, the entire judgment of the trial court has become merged as of the date of the trial court's denial of that motion. Given that the State filed a timely Notice of Appeal from he denial of that motion raising *all* issues decided by the trial court (Amended Notice of Appeal, Jur. St. App. p. 87), the appeal of the motor vehicle excise tax issues has been timely filed.

IV. CONCLUSION

For the reasons stated, the State of Washington respectfully requests the Court to deny the Motions to Dismiss or Affirm on file herein, note probable jurisdiction and set this appeal for full briefing and argument.

DATED this 26 day of January, 1979.

Respectfully submitted,

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